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No. 09-72

Supreme Court, U.S.
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In The

Supreme Court of the United States

DOUGLAS K. BROCAIL,

Petitioner,

v.

DETROIT TIGERS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fourteenth District Of Texas

PETITION FOR REHEARING

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PETITION FOR REHEARING

On October 5, 2009, the Court denied Douglas K. Brocail's petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fourteenth District of Texas in *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90 (Tex. App. – Houston [14th Dist.] 2008, pet. denied). This petition for rehearing is timely filed under Supreme Court Rule 44(2), which states in relevant part that "[a]ny petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial . . . "

I. INTRODUCTION

This appeal arose from the trial court's grant of summary judgment to the Detroit Tigers, Inc. on all of Brocail's claims against the Tigers. On April 3, 2008, the court of appeals issued its opinion and judgment affirming the trial court's summary judgment. *Brocail*, 268 S.W.3d at 90, 94, 111.

The court of appeals held that section 301(a) of the Labor Management Relations Act preempted Brocail's claim that the Tigers fraudulently induced him to sign a contract with the Houston Astros because that claim requires the interpretation of Major League Baseball's Collective Bargaining Agreement ("CBA"). *Brocail*, 268 S.W.3d at 102-03. Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization

> representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

II. THE EVIDENCE

The Tigers signed Brocail, a relief pitcher, to a guaranteed contract under which they agreed to pay him salaries of $900,000 in 2000 and $2,000,000 in 2001. Later, during the 2000 season, Brocail began to experience arm problems.

The Tigers required Brocail to see their team physicians. His symptoms indicated a partially torn medial collateral ligament, but one of the Tigers' team doctors said Brocail only had bone chips in his elbow.

The Tigers put Brocail on the disabled list in August 2000 and urged him to undergo what they represented was the appropriate treatment. Brocail specifically asked whether he had a torn ligament, but the Tigers said his problem was just loose bone fragments.

Believing the Tigers, Brocail had surgery on September 22, 2000. He then began physical therapy.

Major League Baseball's annual winter meetings, during which trades are traditionally made, were scheduled for December. The Tigers could get more for Brocail in a trade if it appeared the surgery had been successful. Trading Brocail would also allow the Tigers to unload his large guaranteed contract.

By November of 2000, Brocail was still going to physical therapy. He was not even able to throw a baseball yet. But on November 7, 2000 – less than two months after the surgery and in time for the winter meetings – the Tigers took Brocail off the disabled list. Then, during the winter meetings, they traded him to the Astros, relieving themselves of his $2,000,000 salary.

Brocail had, not bone chips in his elbow, but a complete tear of the medial collateral ligament and a near-complete tear of the flexor tendon in his pitching arm. He was forced to undergo major surgery to address the injuries.

Brocail could not pitch in 2001, 2002, or 2003, and received no salary in 2002 and 2003. He was finally able to return to baseball during the 2004 season.

Brocail sued the Tigers in state court, alleging they had fraudulently induced him to sign a contract with the Astros.

III. PRINCIPLES OF SECTION 301 PREEMPTION

If resolution of a state-law cause of action does not require actual interpretation of a CBA, the claim is "independent" of the CBA and not preempted. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). Even a need to "look to" a CBA is not enough to find section 301 preemption of a state-law claim. *Livadas v. Bradshaw*, 512 U.S. 107, 124-25 (1994).

"The plaintiff's claim is the touchstone for [a section 301 preemption] analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc). Applied in tort cases, that rules means that a court must determine "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Because it frequently is not, numerous courts have held that section 301 did not preempt a state-law fraud claim.[1]

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[1] *See, e.g., Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1031 (6th Cir. 2001), *cert. denied, International Ass'n of Bridge, Structural, & Ornamental Iron Workers v. Walcher & Fox, Inc.*, 535 U.S. 1017 (2002); *Niehaus v. Greyhound Lines, Inc.*, 173 F.3d 1207, 1212 (9th Cir. 1999); *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535, 539 (9th Cir. 1990), *cert. denied*, 505 U.S. 1212 (1992).

IV. GROUND FOR REHEARING

That a plaintiff bringing a state-law fraud claim must prove reasonable reliance on the representation is practically a universal rule. *See In re United States Office Prods. Co. Secs. Litig.*, 251 F.Supp.2d 77, 101 (D.D.C. 2003); *Merrill Lynch, Pierce, Fenner & Smith v. Barchman*, 916 F.Supp. 845, 854 (N.D. Ill. 1996). The question thus becomes whether a CBA must be interpreted in order to determine if the plaintiff's reliance on the representation was reasonable. As will be discussed below, two competing lines of cases have emerged, and an opinion issued just last month has brought the question to the forefront again.

A. Section 301 Preemption And The Reliance Element Of A State-Law Fraud Claim – The Third Circuit Gets It Right.

In *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995), members of a collective bargaining unit brought a state-law fraud claim against their employer based on promises of job security. *Id.* at 220. The employer "insist[ed] section 301 preempts the employees' fraud claims because proof of fraud requires clear and convincing evidence of justifiable reliance by the recipient upon the misrepresentation. Such an analysis, [the employer] argue[d], requires an interpretation of the [CBA] to determine if the employees justifiably relied on representations guaranteeing job security." 50 F.3d at 231.

The Third Circuit observed that the law of the pertinent state requires a plaintiff alleging fraud to prove justifiable reliance on the misrepresentation. 50 F.3d at 232. The court then held:

> [T]he employees need not depend on the [CBA] to satisfy these elements of state law fraud. This is not a situation . . . where the alleged tort is a violation of duties assumed in the [CBA]. **An examination of the employer's behavior, motivation, and statements does not substantially depend upon the terms of the [CBA]**. The essence of the employees' case is proof of justifiable reliance on the separate guarantees, not on the [CBAs]. As in *Lingle*, **"[e]ach of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer," and may be appropriately resolved under state law.**

Id. (citations omitted).

In *Voilas v. General Motors Corp.*, 170 F.3d 367 (3d Cir. 1999), former GM employees alleged that GM fraudulently induced them to accept early retirement. *Id.* at 370. GM argued that the "reasonable reliance" issue required interpretation of the CBA because one could not determine whether the plaintiffs acted reasonably without weighing all of the contractual options available to them. *Id.* at 376-77. But the Third Circuit noted that "the reliance inquiry is not, as GM suggest[ed], an investigation of the wisdom of the particular choice made by the claimant, but

instead whether the claimant was acting justifiably or reasonably in giving credence to the alleged misrepresentation." *Id.* at 377. **"[T]he reliance question focuses on whether GM's repeated insistence that the plant was going to close was a representation worthy of belief. Patently, this is not a question that depends upon an interpretation of the [CBA]."** *Id.* (emphasis added).

Nor would "resolving whether the employees' reliance was detrimental [ ] require an investigation of the terms of the [CBAs]." 170 F.3d at 377. The court elaborated:

> To be sure, we anticipate that at trial . . . the question whether the plaintiffs were worse off for having taken early retirement may arise. However, the fact that the parties' agreements may be referred to in the course of deciding this issue is of little moment to the preemption question before us. As the Court emphasized in *Livadas*, "the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished."

Id. (quoting *Livadas*, 512 U.S. at 124).

Other courts have taken the same approach as the Third Circuit. In *Felix v. Lucent Technologies, Inc.*, 387 F.3d 1146 (10th Cir. 2004), the defendant "argue[d] that Plaintiffs' fraud claims will require us to interpret the CBA . . . Defendant correctly points out that Oklahoma law requires as an element of

fraud 'reasonable reliance' on misrepresentations . . . " *Id.* at 1164-65 (citation omitted). The Tenth Circuit concluded that the issue was the parties' conduct, not the meaning of the CBA:

> Plaintiffs do not allege that Defendant made any misrepresentations about the terms or application of the . . . CBA. Rather, they allege that Defendant lied in informing them regarding the *choice* between retiring under the June plan or waiting until later. Therefore, there is simply no need to interpret the . . . CBA in order to ascertain whether Defendant's representations were false, and the actual meaning of the CBA . . . is not in dispute. . . . **Plaintiffs' state law misrepresentation claims "depend upon the employer's behavior, motivation, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it."**

Id. at 1165 (quoting *Foy v. Pratt & Whitney Group*, 127 F.3d 229, 235 (2d Cir. 1997)) (emphasis added).

In *Kittle v. Prudential Insurance Co.*, 102 F.Supp.2d 1029 (S.D. Ind. 2000), the defendant "essentially suggest[ed] that resolution of Kittle's state law claims is substantially dependant upon an analysis of the . . . CBA[.]" *Id.* at 1036. Relying on *Lingle* and *McCandless*, the district court concluded otherwise:

> Kittle plainly asserts state law claims for actual fraud, and arguably for constructive fraud as well. . . . [E]ach tort requires a plaintiff to prove in part that the defendant deceptively represented a past or existing material fact and that the plaintiff reasonably relied on the misrepresentation.
>
> The factual core of these claims is straightforward and discernable without interpretation of the [CBA]. Kittle simply alleges that Kemmerer represented and promised that Kittle would receive exclusive responsibility for Agency 68, an alleged fact at odds with his actual assignment to Agency 417 . . . [W]e find that consultation or analysis of the CBA is wholly unnecessary to resolve these factual matters.

Id. (citations omitted).

The issue of whether the employee reasonably relied on the alleged misrepresentation invokes the employer's motivation, behavior, and statements, and the employee's understanding and reaction. It does not require interpretation of a CBA. Therefore, as the Third Circuit has held, it should not be a basis of section 301 preemption.[2]

---

[2] When the essence of the state-law fraud claim is that the employees were fraudulently denied their rights *under the agreement itself* – facts that are "patently different" from *McCandless* and *Voilas* – the Third Circuit does not hesitate to find preemption. *See Beidleman v. Stroh Brewery Co.*, 182 F.3d 225, 234 (3d Cir. 1999).

B. Section 301 Preemption And The Reliance Element Of A State-Law Fraud Claim – The Eighth Circuit Gets It Wrong.

In *Williams v. NFL*, ___ F.3d ___, 2009 WL 2901928 (8th Cir. Sept. 11, 2009), the NFL suspended Kevin Williams and Pat Williams, defensive linemen for the Minnesota Vikings, after they tested positive for a banned substance. *Id.* at *3. The Williams sued several defendants, including the NFL, for fraud. *Id.* at *5 n.7.

The defendants argued that the Williams' fraud claim was "preempted because the Players cannot demonstrate the requisite reasonable reliance to prevail on their claims without resorting to the CBA[.]" 2009 WL 2901928 at *13. The Eighth Circuit agreed:

> [T]he question of whether the Players can show that they reasonably relied on the lack of a warning that StarCaps [the dietary supplement they took] contained bumetanide [the banned substance] cannot be ascertained apart from the terms of the Policy [which was expressly incorporated into the CBA] . . . Because resolving the Players' misrepresentation claims will require interpretation of the Policy, they are preempted by section 301.

Id. at *13. The court reasoned:

> One can only justifiably rely on a statement which conflicts with the provisions of a

> written agreement it has signed if the agreement is couched in ambiguous legal language which a layman could reasonably believe supported the representation.
>
> . . . To determine whether [the plaintiff] justifiably relied on the oral assurances allegedly made by the [defendant], the trier of fact would have to determine whether the contractual language in the CBA was ambiguous enough for a layman reasonably to believe that it was not contrary to the representations on which [the plaintiff] claims it relied. This would require the trier of fact to examine the provisions in the CBA. . . . Since [the plaintiff] has the burden . . . to establish justifiable reliance, it would have to show that all of the cited provisions of the CBA could plausibly be read together to be consistent with its alleged understanding . . . Adjudication of the dispute and resolution of the . . . claims will necessarily involve interpretation of the CBA.

Id. (quoting *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331, 332 (8th Cir. 2006)).

The Eighth Circuit's rationale leads to preemption when it is necessary only to *read* the CBA – to read it to determine if it contains a term which contradicts the defendant's alleged representation. In other words, when the plaintiff alleges that the defendant said X, the Eighth Circuit finds preemption on the ground that one must look at the CBA

to determine whether it states the opposite of X. "But the review of the CBA needed to decide preemption in this case is not in itself 'interpretation' warranting preemption; if it were, the preemption doctrine under § 301 would swallow the rule that employees can assert nonnegotiable state law rights that are independent of their [CBAs]." *Foy*, 127 F.3d at 235 (citing *Milne Employees Ass'n v. Sun Carriers,* 960 F.2d 1401, 1409-10 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993)).

To assert that the justifiable reliance element will require interpretation of the CBA

> proves too much: a [CBA] can always be consulted to determine whether an employee is justified in relying upon an employer's promise. The argument comes down to the idea that an employee is never justified in relying upon any promise by the employer that is not enforceable under a CBA. If that were so, the existence of a CBA would require preemption in all cases involving representations made to employees. But the Supreme Court has recently clarified that § 301 preemption applies only when necessary "to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, nor by parties' efforts to renege on their arbitration promises by relabeling

> as tort suits actions simply alleging breaches of duties assumed in [CBAs]."

Foy, 127 F.3d at 235 (quoting *Livadas*, 512 U.S. at 122-23).

If resolving a state-law cause of action requires *interpreting* a CBA, there is no doubt the claim is preempted. *See Lingle*, 486 U.S. at 407. But the fact that a CBA will be merely *consulted* in the course of state-law litigation does not require preemption. *Livadas*, 512 U.S. at 124.

The Fourteenth Court of Appeals made the same mistake the Eighth Circuit made. It held that "[b]ecause the CBA governs assignment of his contract, Brocail's claim that the [Tigers] fraudulently induced him to enter a contract with the Astros is preempted. In particular, it is necessary to interpret the CBA to determine whether Brocail's consent to the assignment was necessary, and whether reliance on any representation by the [Tigers] concerning assignment of his contract was reasonable in light of the CBA." *Brocail*, 268 S.W.3d at 103 (citation omitted).

Whether Brocail's consent was necessary can be determined from simply reviewing the CBA. No interpretation is necessary.

Likewise, the question of whether Brocail's reliance on any representation the Tigers made was reasonable requires consulting, but not construing, the CBA. There is no provision in the CBA that sets a standard for reasonable reliance or somehow

precluded Brocail from relying on the Tigers' representations.

V. THE COURT SHOULD GRANT REVIEW.

A need for interpretation is required for section 301 preemption, and a court's mere *examination* of a CBA is not tantamount to interpreting it. *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995); *Milne Employees Ass'n*, 960 F.2d at 1409. Losing sight of the latter fact, the Fourteenth Court and the Eighth Circuit have put the simple review of a CBA on par with interpretation. As a result, the type of garden-variety, state-law tort claims which preemption was never intended to reach are being wrongly extinguished. To vindicate the longstanding rule that "as long as the state-law claim can be resolved without *interpreting* the agreement," the claim is not preempted (*Lingle*, 486 U.S. at 409-10 (emphasis added)), Brocail respectfully asks the Court to grant this petition, hear his case, and reassert the dispositive distinction.

Respectfully submitted,

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GOOD FAITH CERTIFICATION OF COUNSEL

Pursuant to United States Supreme Court Rule 44(2), I hereby certify that (1) this petition for rehearing is presented in good faith and not for delay, and (2) this Petition for Rehearing is restricted to the grounds specified in Rule 44(2). Specifically, this Petition for Rehearing is restricted to "other substantial grounds not previously presented."

Signed this 27th day of October, 2009.

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